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No.

In the

Supreme Court of the United States

KATHY W. FENTROY,

Petitioner,

v.

DILLARDS TEXAS OPERATING LIMITED PARTNERSHIP,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are racial comments directed towards a plaintiff required under Title VII to establish a claim of hostile work environment when there is sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion and other general racial differences in treatment in the workplace?

2. Can sufficient evidence of racially disparate treatment in terms and conditions of employment, such as promotion, compensation, demotion, and general racial difference in treatment in the workplace, be used to support a claim of hostile or abusive work environment racial harassment?

3. Has the plaintiff established a claim of a racially hostile and discriminatory work environment when she presents sufficient evidence that she was persistently subjected to a work environment, in which she was harassed and discriminated against because of her race, in that less qualified white employees were given promotions, larger raises, more desirable work assignments, similarly situated white employees were returned to their regular positions after their leave of absence terminated, while plaintiff was assigned to an inferior position and that she was criticized more harshly than similarly situated white employees?

4. When the Circuit Court reversed the trial judge's order denying the employer's motion for judgment as a matter of law and amended judgment, awarding compensatory damages and rendered judgment as a matter of law for the employer, did the Circuit Court commit reversible error?

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IN THE

SUPREME COURT OF THE
UNITED STATES

KATHY FENTROY, Petitioner

Versus

DILLARD TEXAS OPERATING LIMITED PARTNERSHIP,
Respondent

PETITION FOR WRIT OF
CERTIORARI

Petitioner Kathy W. Fentroy ("Fentroy") respectfully requests that a writ of certiorari be issued in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is found in Appendix A. The unpublished opinion and the amended judgment of the District Court of the Southern District of Texas, Houston Division is found in Appendix C. The memorandum and opinion granting in part and denying in part, summary judgment is in Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on November 9, 2001. The Court of Appeals denied Fentroy's petition for rehearing on December 6, 2001 ,(Appendix B).

Subject matter jurisdiction for the United States District Court for the Southern District of Texas is invoked under 28 U.S.C. ss 1331 and ss 1343 (a) (4).

Jurisdiction of the Court of Appeals for the Fifth Circuit is pursuant to 28 U.S.C. ss 1291.

Jurisdiction of this Court is invoked under 28 U.S.C. ss 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, amended, recites in relevant part:

It shall be unlawful employment practice for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual ....race.

Rule 50 of Title 28 provides in relevant part:

> (a) Judgment as a Matter of Law.
>
> (1) If during the trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.

If for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling a renewed motion, the court may:

(1) if a verdict returned:
(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

STATEMENT OF THE CASE

Kathy W. Fentroy began a career in retail as a part-time sales associate at Joske's in 1980 while attending the University of Houston. After graduation, she worked full-time in the Gulfgate store women's department. She was selected for Joske's executive training program to prepare her to advance to area sales manager (ASM), operations manager, merchandise manager, assistant buyer, buyer and store manager positions. [Tr. 1-101:5-103:8]. She was promoted to ASM and worked in various departments, including, petite's, dresses, linens, gifts, lamps, children's, men's, and cosmetics, where she performed inventories, supervised sales associates, met with the store manager on

merchandise and department needs and various other duties. [Tr. 1-103:16-120:20].

Dillard's acquired Joske's in 1987. Fentroy, the only black ASM, worked in the men's department at the Gulfgate store and was involved with the transition. Subsequently, she was rated as very good and satisfactory with outstanding accomplishments.

In 1991, Fentroy questioned a $500.00 raise and her supervisor obtained more money for her. [Tr. 1-127:19-130]. She was rated promotable. [Tr. 1-120:3-127:14].

Dillard's opened the Texas City store and Fentroy gained valuable experience in assisting with the opening. She had already been involved in two renovations. [Tr. 1-129:15-1-132]. Fentroy was not satisfied with her relocation raise because she suspected that some white ASM's received more money.[1]

Fentroy informed Dillard's of her interest in a promotion. [Tr. 1-139:15-140]. She was concerned because promotions generally came from larger volume areas, but she was given less prestigious areas. Fentroy wrote to Gat Lemoine, director of stores, on August 11, 1994 of her aspirations of advancement with the company. [Tr. 1-139:22-1-141 (P.Ex. 11)].

In September 1994, Fentroy was transferred to the Woodlands store where she was the only black ASM. Fentroy was assigned to the highly visible prestigious men's department, an extremely high volume area. [Tr. 1-148: 7-9]. Harry Williams, a store manager, was Fentroy's supervisor. She worked almost single-handedly to prepare the department for the store opening and it was a success.[2] [Tr. 1-147: 3-11;]. Fentroy was assigned an assistant who was later taken away for use in another area, which resulted in trouble spots in Fentroy's department. [Tr. 1-147: 19-25, - 148: 1-12; Tr. 3-57: 19-25, 3-58: 1-8]. The assistant was given to a white ASM. [Tr. 1-145: 14-25, 1-146: 1-10].

After the busy Christmas selling season, Lemoine told Fentroy that Mr. Dillard was impressed with the men's area

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[1] She learned in discovery that she had received less. [Tr. 1-134:2-136:2].

[2] Sharron Green, a sales associate, testified that construction workers were seen taking items from the store.

during his holiday visit. [Tr. 1-140: 5-10]. However, the inventory was then taken and there was a severe shortage in the men's department, [Tr. 1-152: 22-25], as well as in other departments. [Tr. 1-152: 13-16]. Fentroy was called behind closed doors with Williams and Lemoine and harshly criticized and in so many words accused of theft. [Tr. 150: 13-25-1-154: 1-19]. Fentroy was given an ultimatum. To stay in her ASM position, she had to turn the inventory around or she would be terminated, or she could take a lesser volume area in another store. [Tr. 1-153: 1-14]. Although other ASM's had inventory shortages, they were not treated in the same manner. All ASM's were given written counseling. [Tr. 1-153: 15-24; 1-154: 11-25-1-155: 1-17; (P. Exs. 14, 53, 60, 68, 70, 71). Usually, the ASM's were given an opportunity to improve before they were faced with termination. [Tr. 4-67:3-7].

After the January inventory, Williams spoke to Fentroy in a harsh, insulting and demeaning manner. [Tr. 1-157: 24-25, 1-158: 1-25, 1-159: 1-11]. He told her it would be hard to do the turnaround, but that she had to do it. He pressured her once or twice a week commenting that, "These results have to be good. This had to be done. You have to be on track." White ASM's with inventory shortages were not treated in the same manner. [Tr. 1-159: 12-25, 1-160: 1-12]. Still, Fentroy was working without an assistant, but she believes that Felicia Tillery, a non-black ASM, had an assistant. [Tr. 1-160: 16-25, 1-161:1].

When the June 1995 inventory was completed, Fentroy had a very good inventory, but she received even harsher criticisms from Williams, Lemoine and Olejniczak, operations manager. [Tr. 1-161: 1-25, 1-162: 1-25, 1-163: 1-24].[3]

Fentroy became ill and had to seek medical attention. She missed time from work because of panic attacks and acute depression. [Tr. 1-172: 4-13]. She could not sleep at night because she knew that when she awakened, she would have to go to work and go through the same harassment

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[3]Williams belittled her after a highly successful Sunday sale. Lemoine commented that the very good inventory could be better. Fentroy had the best schedules according to Olejniczak but they could be better. [Tr. 4-34:4-120].

again, so she would sit up all night. It got to the point that she could not even leave the house. [Tr. 1-172: 16-25].

Temple[4] testified that she observed interaction between Williams and Fentroy. Temple testified that Fentroy "would get an awful lot of pages to the office or just to her department". At ASM meetings, Temple could tell that Fentroy was under enormous pressure to get a lot of things done because she had no assistant, although she had the second largest volume department. According to Temple, other ASM's were not treated in the same manner. [Tr. 2-167: 3-25, 2-168: 1-25, 2-169: 1-6].

Temple testified that Williams divided the damage dollars and white ASM's received a lot more damage dollars than black ASM's. [Tr. 2-169: 7-25]. She further explained that if you did not receive damage dollars you could not pass your inventory. [Tr. 2-170: 3-8].

Further, Temple testified that Olejniczak told her that she could not hire a black applicant who Temple believed was "super qualified" for a sales position. Olejniczak informed Temple that she was to hire to reflect the community of the Woodlands store and that they were not to make their customers uncomfortable. The Woodlands is a mostly Caucasian community. [Tr. 2-157: 13-25, 2-158: 1-22].

Tillery testified that Williams told her that blacks make the store look "dingy" during a discussion about his reason for not hiring a black applicant, as he did not wish to have more black employees. She was told to place the applications of black applicants to the side. Tillery testified that very few black applicants were hired as compared to whites and Hispanics. Olejniczak told Tillery, "Well, this is a classy community and they are basically white so we have to hire associates that would fit within the store and the community." Black applicants, with very few exceptions, did not make it to the third interview, even though some had such qualifications described as vibrant, imaginative, fast, easy to get along with, knowledgeable, potential to move up within the company.

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[4]Denine Temple, an African-American, was hired April 8, 1995 as a sales associate and promoted to ASM within the very short span of three (3) months.

In 1995 Fentroy received a $500.00 raise and her white counterparts received approximately $2,000.00. [Tr. 3-44:13-18 (ROA 680 –684)].

Evidence was presented to the jury that Tillery observed the intimidation, ridicule and insults suffered by Fentroy. In meetings, Williams was more expressive, waved his hands and spoke to Fentroy in a manner unlike he spoke to everyone else. [Tr. 2-212: 7-16]. Tillery testified that Fentroy was scrutinized more than other ASM's at the meetings.[Tr. 2-212: 17-22] and that he just "rode" on her.[Tr. 2: 212: 23-25]. Williams told Tillery, concerning Fentroy, "she had to be gone." [Tr. 2-213: 4].

Tillery and other ASM's tried to assist Fentroy by entering markdowns and schedules for her, especially while she was on leave of absence. But, often, the markdowns were not approved, schedules were changed which left Fentroy's floor unmanned. Hours were taken away from her, even while she was there and given to the cosmetics ASM, who is white. [Tr.2-212:11-25]. There were days when the men's department had only four people working and it was "absolutely" horrendous because people were walking everywhere."[Tr. 2-214; 1-19]. Tillery was then told that she was not to assist Fentroy. [Tr. 2-214: 20-24], and that Fentroy was unfit to be an ASM. [Tr. 2-215: 4-7]. Olejniczak and Williams asked Tillery to watch Fentroy and Olejniczak said that Fentroy was not going to pass the inventory. [Tr. 2:215: 8-25, 2:216: 1-25].

Fentroy was not functioning. She lost all of her hair. She wasn't associating with people. She missed work. [Tr.1-173: 1-11; P. Ex. 16]. During an absence from August 22, 1995 to August 29, 1995, Fentroy called in and Williams told her that she needed to come to work or they would find someone else to do her job. [Tr. 1-173: 4-25]. When she returned to work she had a panic attack and was out again. [Tr. 1-174: 1-25, 1-175: 1-5]. Again, Williams threatened to terminate Fentroy. [Tr. 1-175: 15-25]. When Fentroy returned to work on September 18, 1995, she started shaking uncontrollably, crying and "just having a breakdown." [Tr. 1-176: 1-15]. During this episode, Fentroy met with Williams and Olejniczak who suggested that she request a fax from her

doctor to be assigned to a lower volume area, which she rejected, and to sign the leave of absence form. She signed the form and was driven to her home by a coworker. [Tr. 1-176: 16-25) 1-177: 1-7 (P.Ex. 20)].

On December 8, 1995, Fentroy was released to return to work without need for reasonable accommodations. She returned to work on December 11, 1995. [Tr. 1-182: 7-25 (P.Ex. 22)]. Upon return, Fentroy was informed by Williams that there were no management positions available and she was assigned to the women's department, dresses area, as a sales associate at $9.70 per hour, a cut in pay of approximately $1,400.00 per month. Her supervisor was Tillery who testified Williams knew that there was indeed a management position available in the women's department for an assistant ASM. [5] [Tr. 1-183: 1-25, 1-184: 1-14, 2-218: 1-23]. Mark Castro, a non-black ASM, replaced Fentroy in the men's department.

Fentroy was taken aback by the demotion and cut in pay. She called to report this directly to Alex Dillard on December 13th and spoke with his secretary. Lemoine called and yelled at Fentroy that she should not have called Dillard and that she should have called him for an explanation.[Tr. 1-184: 17-25, (P.Ex. 26)]. He told her that she had requested the demotion and that she had been out ill a long time. Fentroy did not request a demotion.

Candis Gatewood, a white ASM, who worked with Fentroy in the Texas City store, was returned to her ASM position after a leave of absence which exceeded twelve (12) weeks. [Tr. 1-185: 1-22 (P.Ex. 84)]. Lemoine's territory included the Texas City store. Williams testified that the corporate policy regarding leave of absence was very rigid. He also consulted with Lemoine regarding availability of management positions and the demotion. [Tr. 3-185:2-7, 4-75:2-23].

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[5]Summary judgment evidence indicates that sixteen positions became available for operations manager and merchandise manager in stores supervised by Lemoine between 1994 and February 9, 1996. More than 200 positions above the level of ASM were filled in the Texas area from 1991 to 1996. The jury did not receive most of this evidence.

For almost two months after she returned to work, Fentroy continued to be subjected to insult, ridicule and intimidation. She was ignored by upper management, questioned and discredited by peers. She was watched and given less than forty hours a week. Williams chose a new hire, standing right next to Fentroy, as the store auditor during inventory, even though Fentroy had taken over 30 inventories and managed over 100 people. She observed that white ASM's fresh out of college were in positions that she had been told should be considered a promotion for her after many years of working to get to that point. [Tr. 1-188: 1-25, 1-188: 1-25, 1-189: 1-3]. After sixteen years, in retail with Joske's, then Dillard's, over twelve of those years as an ASM, Fentroy was demoted to the entry-level position she had held as a college student.

Fentroy submitted a letter of resignation effective February 9, 1996, to management. She notified Mr. Dillard by letter, but she received no response.

PROCEEDINGS BELOW

The jury was instructed, by the trial judge based upon the instructions submitted by the parties, without objection, on the elements under Title VII for finding discriminatory failure to promote, discriminatory compensation and demotion and on the elements of a hostile work environment-racial harassment claim. [6] The jury was asked if Dillard's subjected Fentroy to a hostile and abusive work environment on account of her race, and they answered yes. Additionally, the jury was instructed on compensatory and punitive damages and awarded $24,000.00 in compensatory damages and $72,000.00 in punitive damages. Dillard's filed a motion for judgment as a matter of law on five grounds as follows:

1. that some of the acts upon which Fentroy bases her claim

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[6] Although Dillard's instruction number 11 contained qualifying language, and objection was not addressed to the trial judge at the charge conference. The parties consented to the questions to the jury regarding the work environment (Appellant's Record Excerpts 9).

are barred by the statute of limitations;

2. that there is insufficient evidence of discrimination to support the verdict;

3. that certain evidence was improperly admitted at trial;

4. that there is insufficient evidence of causation to support the verdict; and

5. that there is insufficient evidence to support an award of punitive damages.

The trial judge found that Dillard's was not entitled to relief based on the first four grounds, but that judgment was a matter of law in Dillard's favor was appropriate regarding the punitive damages award. Dillard's filed an appeal to the Fifth Circuit Court of Appeals. Subsequently, Fentroy filed a cross appeal on the punitive damages issue.

The Court of Appeals reversed, finding that Fentroy may have presented sufficient evidence of disparate treatment in promotion, compensation and demotion, but that the jury was not asked whether Fentroy was subjected to disparate treatment on account of her race. The jury was asked whether Fentroy was subjected to a hostile and abusive work environment on account of her race and the Court of Appeals recited that the disparate treatment evidence did not support that question. The Court of Appeals maintained that there was no evidence of racially discriminatory, intimidation, ridicule or insult and that no evidence indicated that Fentroy was the subject of racial harassment. The Court of Appeals reasoned that Tillery's testimony did not indicate that anyone made remarks about Fentroy's race or that she knew any facts to suggest that Williams wanted Fentroy gone because she was African

American. The Court of Appeals held that the trial judge erred in denying Dillard's motion for judgment as a matter of law and the amended judgment was reversed. The court noted that arguably, Fentroy might have been entitled to remand of her disparate treatment claim, but that she had waived remand by not challenging the trial judge's summary judgment order. (Appendix D). Fentroy filed a petition for rehearing, which was denied on December 6, 2001. Therefore, Fentroy filed timely this petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE INTENT OF CONGRESS ON AN IMPORTANT FEDERAL QUESTION THAT WAS DECIDED BY THE COURT OF APPEALS IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

This case presents the question of whether racial comments must be directed towards a plaintiff to establish hostile work environment racial harassment or whether evidence of persistent and pervasive discriminatory conduct, which destroys equal opportunity in the workplace, can be used to support this claim.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399,91 L. Ed.2d 49 (1986), this Court explained that a violation of Title VII might be established by proving that discrimination based on sex has created a hostile work environment. Fentroy presented sufficient evidence that she was persistently subjected to a work environment in which she was harassed and discriminated against because of her race in that less- qualified white employees were given promotions, larger raises and more desirable work assignments. Further, she presented sufficient evidence that white employees who were on leave were returned to their regular ASM positions after their leave terminated, whereas Fentroy was assigned an inferior position, and that she was criticized more harshly. Although the Court of Appeals found sufficient evidence of disparate treatment in terms and conditions of employment, such as promotions, raises, demotion upon return from leave of absence, harsher discipline, and other acts showing a difference in treatment, the court explained that this evidence cannot support a hostile work environment claim.

This is not the typical hostile work environment racial harassment case where racial slurs permeate the workplace. This is a hostile work environment racial harassment case

where persistent and pervasive discrimination based on race permeates the workplace, with such frequency and severity as to destroy equal opportunity in the workplace. The critical issue, under Title VII, is whether members of one race are exposed to disadvantages terms and conditions of employment to which members of the other race are not exposed. See *Harris* 510 U.S. 25 (Ginsburg concurring).

To establish an actionable claim of hostile work environment racial harassment under Title VII, plaintiff had to demonstrate the following five elements: (1) she belongs to a protected class; (2) she was subjected to unwelcome racial harassment; (3) the harassment complained of was based on her race; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer is liable for the harasser's conduct and knew or should have known of he harassment and failed to take prompt, effective, remedial action. *Meritor Savings Bank F.S.B. v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 at 2402-07, 91 L.Ed.2d 49 (1986); *Cortes v. Maxus Exploration Company*, 977 F.2d 195, 198-9 (5th Cir. 1992).

The Court of Appeals agreed that Fentroy was subjected to disparate treatment because of her race. The court must view the facts, circumstances and the entirety of the trial record in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determination, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury that voted unanimously in Fentroy's favor, which found that Fentroy was subjected to a racially hostile or abusive work environment on account of her race. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S., 120, 133 S. Ct. 2097, 147 L.Ed 105 (2000).

This court decided that

> Although this evidence may support a jury verdict for a disparate treatment claim, the jury was not asked whether Fentroy was subjected to disparate treatment because of her race. Instead, the jury was

> asked whether Dillard's "subjected Ms. Fentroy to a hostile or abusive work environment on account of her race?" The evidence discussed above does not support this question.

The court of appeals erred in its decision.

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e – 2(a)(1). *See also Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

This Court has repeatedly held that the question of whether a work environment is "hostile" or "abusive" in violation of Title VII can only be determined by looking at ***all circumstances*** which may include frequency of discriminatory *conduct*, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with employees work performance. *Harris*, 510 U.S. at 23 .

It was the persistence of the treatment Fentroy received in every aspect of the employment relationship that made the environment racially hostile and abusive. Taken as a whole, the circumstances, evidence and testimony in *Fentroy v. Dillard Texas Operating Limited Partnership* unequivocally support, among other incidents, that Fentroy was *persistently* passed over for promotions that were granted to lesser qualified white employees, that Fentroy received smaller pay raises than her white counterparts, that Fentroy was disciplined more harshly than white ASMs, that Fentroy was demoted upon return from medical leave, unlike white employees, and that the store's manager and operations manager had a discriminatory attitude against certain potential employees, because they did not "reflect the store's community", they "made the store look dingy" and ultimately, because they were black.

Having one's career advancement and job security threatened because of her race is pervasively insulting and intimidating. As the evidence and testimony indicate, Mr. Williams' discriminatory attitude toward Ms. Fentroy did not change even as she made great strides to meet the inventory and performance expectations. It did not matter how well she performed on the job, because the fact that she was black did not change.

In *Harris*, this *Court* considered the definition of a discriminatorily abusive work environment and explained that a hostile or abusive working environment can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. *Harris v. Forklift*, 510 U.S. at 20.

Denying raises and promotional opportunities to an employee after more that a dozen years of service simply because she is black is humiliating and serves well to discourage an employee from remaining on the job. Overall, making an employee the subject of harsher criticism, greater scrutiny and racially disparate treatment in the terms, conditions or privileges of employment is both intimidating and humiliating.

Ms. Fentroy has shown through evidence and testimony in the record that she was the subject of insult, intimidation, humiliation and disparate treatment in the workplace because of her race. The court, however, concluded that:

> No evidence indicates that Fentroy was the subject of racial harassment.
>
> Even Tillery, who was arguably the most damaging witness for Fentroy, testified that she was not aware of anyone making any remarks about Fentroy's race, and that she did not know of any facts that suggested that Williams wanted Fentroy gone because she was African American.

> Without evidence of racial harassment, there is not evidence to support the jury's verdict.

The phrase terms, conditions, or privileges of employment evinces a congressional intent 'to strike at the ***entire spectrum of disparate treatment*** of [whites] and [blacks] in employment,' ***which includes requiring people to work in a discriminatorily hostile or abusive environment***. *Meritor*, 477 U.S. at 65; *Harris*, *510* at 20.

The court of appeals is establishing that if an employer falls short of making open or direct racially offensive remarks or comments about an employee's race, that there can be no success on a racial harassment or racially hostile or abusive work environment claim. The court of appeals has erred by failing to consider the distinct possibility that an employer's discrimination "may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees." *Rogers v. EEOC*, 454 F. 2d 234 (5th Cir. 1972).

Did Congress intend that racial slurs be necessary to prove discriminatory terms and conditions of employment under Title VII? In *Rogers*, the court does not indicate that racial slurs or comments were directed towards the plaintiff. The Fifth Circuit recited that mere utterance of racial epithets was not sufficient to establish a hostile work environment. Fentroy asks this court to recognize that "as patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate would undoubtedly devise more sophisticated methods to perpetuate discrimination among employees." *Id.*

The language of Title VII evinces a Congressional intention to define discrimination in the broadest possible terms. *Rogers v. EEOC, 454 F. 2d at 237.* "Employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and

butter issues." *Id.* As a judicial body, the court "must be acutely conscious of the fact that Title VII should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." *Id.*

OTHER CIRCUIT COURTS

The Court of Appeals has taken an extremely narrow view that there was no evidence which indicated that Fentroy was subject of racial harassment by limiting its review of the evidence to the Tillery's testimony that she was not aware of remarks about Fentroy's race or that Williams wanted Fentroy gone because she was African American. Under this definition of workplace harassment, the employer's discrimination against other African Americans would be irrelevant to whether Fentroy suffered racial harassment. Such a myopic view of harassment is not in keeping with the directives of *Harris v. Forklift Sys.*, 510 U.S.17 (1993), that courts are to consider the "all of the circumstances" in determining whether a hostile work environment exists. See e.g. *Jackson v. Quanex Corporation*, 191 F.3d 647 (6th Cir. 1999), (citing *Burns_v. McGregor Elec. Indus., Inc*, 955 F. 2d 559 (8th Cir. 1992) abrogated on other grounds by *Miller Woodharbor Molding & Millwork., Inc.* 174 F. 3d 948, 949 (8th Cir. 1999). (Under the totality of the circumstances approach, a district court should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode); *Andrews v. City of Philadelphia.*, 895 F 2d 1469,1484 (3rd Cir.1990) ("[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.") As the *Quanex* court further explained the entire purpose of a hostile work environment claim is defeated if each offensive event is considered in isolation as the very meaning of "environment" is [t]he surrounding conditions, influences or forces which influence or modify. Blacks Law

Dictionary 534 (6th ed, 1990). Conduct need not be directed at the plaintiff in order to constitute conduct violating Title VII. *Id.*

Title VII prohibits" working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of the minority groups workers" *Meritor Savings Bank v. Vinson*, 477 U.S. 57,66 (quoting *Rogers v EEOC*, 454 F 2d 234,238 (5th Cir. 1971). In *Rogers*, the court approved a Title VII harassment claim brought by a Hispanic employee who contended that her employer created a hostile work environment for employees by discriminating against the Hispanic clientele. The *Rogers* opinion did not indicate that racial slurs were directed towards the plaintiff. *Meritor* dictates that an employee may create hostile work environment even when it directs its discriminatory acts or practices at the protected group of which the plaintiff is a member and not just the plaintiff herself.

In the instant case, Fentroy presented sufficient evidence that Dillard maintained discriminatory hiring practices, as blacks made that store look "dingy".

In the "totality of the circumstances" approach, the court must look at the evidence of racial harassment, such as Fentroy's testimony that she was the only African American ASM at the Woodlands store until Denise Ingram was hired and quickly promoted. Tillery's testimony that Fentroy (1) was singled out and that Williams just "rode on her ", (2) Fentroy didn't have proper staffing in her area, (3) was treated differently than white ASM's in the way in which Williams talked to her ASM meetings, more scrutiny on her (4) hours taken away from her and given to Julie Allen, a white ASM, (5) Tillery was told not to help Fentroy who had the highest second highest volume area in the store (6) has no management help as her assistant was taken away to help non black ASM's (7) markdowns entered for her by telling were not approved by Williams which affects inventory. Fentroy testified that she was treated differently than white ASM'S. A hostile work environment claim must set forth evidence of discrimination based on race. *Oncale v. Sundowners 523* U.S. 75 (1998) . Discrimination based on

race simply means a difference in treatment of similarly situated employees on account of race Fentroy set forth sufficient evidence of that discrimination based on race created a hostile work environment, especially at the Woodlands store; and the disparate treatment provided further evidence of racial motivation. In *Huckabay v. Moore*, even though there was language by coworkers indicating race animus, this reverse case indicates that difference in treatment of similarly situated employees is used in determining whether a work environment is hostile on account of race 142 F.3d 233 C 5th Cir 1998).

As set forth above, other courts of appeal have taken a different view concerning the importance of racial, sexual, and age-based comments and conduct that are not directed towards a plaintiff, but are directed towards the plaintiff's protected class. Although the racial harassment cases reviewed contained racial slurs which are not present in the case at bar, other courts of appeal have explained that it is important to consider comments or conduct that are not directed towards the plaintiff as evidence that the work environment is objectively hostile towards a plaintiff's protected class. *Jackson v. Quanex*, 191 F.3d 647. Further, the court determined that racial slurs need not be hurled at a plaintiff in order to contribute to a work environment hostile towards the plaintiff. *Id.* (citing *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673-75 (7th Cir. 1993).

The comments made by Dillard's management evidence an objectively hostile work environment. Managerial policy, when coupled with numerous discriminatory comments by individuals in high positions in a company, could indicate a cumulative managerial attitude that influences decision making for a considerable time, creating a corporate mindset or discriminatory atmosphere. *Ercregvich v Goodyear Tire and Rubber Co.*, 154 F.3d 356 (6th Cir. 1998) (an age case). Evidence of a sexual work atmosphere along with evidence of a specific hostility directed towards an employee is an important factor in assessing a claim of hostile work environment. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987). In determining whether a plaintiff has established hostile work

environment sexual harassment, the trial court should consider any harassment or unequal treatment based on sex, even if those acts are not sexual in nature. Since a critical issue is the environment, "incidents of sexual harassment directed at employees other than the plaintiff can be used as proof of the plaintiff's claim of a hostile work environment. *Stahl v. Sun Microsystems*, 19 F.3d 533 (10th Cir. 1994) (citing *Hicks v. Gates Rubber Co.)*. The same should apply to environmental racial harassment.

CONCLUSION

Fentroy respectfully requests that this Court grant her writ of certiorari to clarify the intent of Congress on this very important federal question. Congress intended that Title VII would result in the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 158 (1971).

When the purposes of Title VII are truly achieved, Kathy W. Fentroy and others in her position will have no need to seek redress through the court process. Employers such as Dillard's will be greatly enriched with a loyal and dedicated workforce. In sum, our country will be greatly served in upholding the laws for all by requiring equal opportunity in the workplace.

Dated: March 6, 2002

Respectfully submitted,

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No. 00-20552

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KATHY W. FENTROY,
Plaintiff-Appellee – Cross-Appellant,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant – Cross-Appellee.

No. 00-20990

KATHY W. FENTROY,
Plaintiff-Appellee,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants,

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Texas, Houston

Before DAVIS and JONES, Circuit Judges,
and PRADO,[1] District Judge.

Filed November 9, 2001

PER CURIAM:[2]

This appeal arises from Kathy Fentroy's lawsuit against her former employer, Dillard's Texas Operating Limited Partnership (Dillard's), and Fentroy's former supervisor, Harry Williams. Fentroy initially sued Dillard's and Williams for employment discrimination based on race and disability, intentional infliction of emotional distress, and failure to comply with the notice provisions of the Family and Medical Leave Act. The district court granted summary judgment on most of these claims, and for Williams, but determined that Fentroy had raised issues of material fact regarding her Title VII claim. Fentroy's complaint described conduct amounting to disparate treatment on the basis of race, and alleged that the conduct subjected her to a hostile work environment. Although Fentroy's complaint was somewhat confusing, the district court characterized Fentroy's Title VII claim as a hostile work environment claim. The case proceeded to trial against Dillard's on that theory- i.e., hostile work environment.

The jury found that Dillard's had subjected Fentroy to a hostile work environment on account of her race, and awarded Fentroy $24,000.00 in compensatory damages. The jury also found that Dillard's acted with malice or reckless indifference to Fentroy's federally-protected rights, and awarded Fentroy $72,000.00 in punitive damages. After entering a judgment consistent with the jury's verdict, the district court acted on Dillard's motion for judgment as a matter of law, and set aside the punitive damages award. Dillard's then filed a notice of appeal to challenge the jury's liability finding and the compensatory damages award.[3] Fentroy also filed a notice of appeal to challenge the setting-aside of the punitive damages award.[4] This opinion considers both appeals.

Dillard's Appeal

Dillard's presents eight issues for review. This court, however, need only consider one issue to resolve Dillard's

appeal-that is, whether the district court erred in failing to grant Dillard's motion for judgment as a matter of law as to the sufficiency of the evidence to support the jury's finding of liability for a hostile work environment.

This court reviews the district court's denial of a motion for judgment as a matter of law under the same standard that the district court uses in considering the motion at trial. See Conkling v. Turner, 18 F.3d 1285, 1300 (5th Cir. 1994). Judgment as a matter of law is proper if after a party has been fully heard by the jury on a given issue, "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." FED. R. Civ. P. 50 (a). In evaluating the motion, the district court must view the entire trial record in the light most favorable to the non-movant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts to the jury. See Conkling, 18 F.3d at 1300. "The 'decision to grant a directed verdict . . . is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury.'" Id. at 300-01 (citations omitted). Consequently, this court must determine whether sufficient evidence was presented during trial to permit a reasonable jury to find for Fentroy on the hostile work environment question.

To prove that she was subjected to a racially hostile work environment, Fentroy was required to prove: (1) that she belongs to a protected class, (2) that she was subject to unwelcome racial harassment, (3) that the harassment was based on race, (4) that the harassment affected a "term, condition, or privilege" of employment, and (5) that Dillard's knew or should have known of the harassment and failed to take prompt remedial action. See Shepherd v. Comptroller of Pub. Accounts of State of Tex.,168 F.3d 871, 873 (5th Cir. s999). In addition, Fentroy had to show: (1) racially discriminatory intimidation, ridicule and insults, which were (2) sufficiently severe or pervasive that they (3) altered the

conditions of employment and (4) created art abusive working environment. See DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995).

> Whether an environment is "hostile" or "abusive" is determined by looking at all the circumstances, including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. To be actionable, the challenged conduct must be both objectively offensive, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so.

Shepherd, 168 F.3d at 874. As a result, this court must review the evidence in the light most favorable to Fentroy to determine whether Fentroy met her burden.

Fentroy based her employment discrimination claim upon a chronology of incidents in which she contends she was treated differently from her white co-workers. These incidents allegedly began in 1989 and continued until the end of Fentroy's employment in 1996. Although many of these incidents occurred well outside the 300-days limitations period that applies to an employment discrimination case, the incidents simply do not support a hostile work environment claim even when viewed in the light most favorable to Fentroy.

For example, Fentroy testified that she served as an Area Sales Manager (ASM) for Dillard's Woodlands store. She described how she played an instrumental role in opening the new store in September 1994. Fentroy explained that in January 1995, the store conducted an inventory and that her department had a big shortage. Fentroy testified that she was counseled regarding the shortage, and that she felt that she

was given an ultimatum to turn the inventory around or that she would be terminated or moved to another position. Although Fentroy stated that other ASMs were counseled for shortages in their departments, she asserted that Williams pressured her about improving the inventory in her department. Fentroy also testified that she was disciplined more harshly than other ASMs for inventory shortages. She asserted that even though she had a good inventory the following July, store managers criticized her even more harshly than before. Fentroy opined that her treatment was due to her race-that is, because she is black.

Fentroy also explained that after being on medical leave for over twelve weeks, she was demoted upon her return and reassigned as a sales associate. She complained that white associates and managers who returned from medical leave were not demoted. To support this position, Fentroy used company documents she obtained from Dillard's during discovery to demonstrate that white employees were permitted to return from medical leave and
return to work in the same position they held prior to medical leave.

Fentroy also asserted that lesser qualified white employees were promoted and that she was not promoted because she is black. Fentroy used discovery documents to demonstrate that white employees were promoted and received bigger pay raises than she did. Fentroy attributed this treatment to her race.

Denine Ingram, a black individual who worked at the store during Fentroy's employment, testified that the store's operations manager told her to hire employees to reflect the store's community. Ingram, an ASM at the time, stated that the store's community was mostly Caucasian, and that the operations manager had refused to hire a qualified black applicant that she recommended.

Sharon Green, a sales associate in Fentroy's department, testified that the January 1995 inventory showed almost a half

million dollars in shortage. Green speculated that the construction workers that were still working in the store took much of the merchandise reflected by the shortage.

Felicia Tillery, a former employee, testified that the majority of black applicants she recommended for third interviews were not selected for employment. Tillery explained that she arrived at the Woodlands store a few months after it opened, and observed that Fentroy was more scrutinized than other ASMs. She described an incident in which she contended Williams told her that Fentroy was unfit to be an ASM, and that Williams told her to watch Fentroy after she returned from medical leave. Tillery also stated that the operations manager told her to place applications from black applicants aside, and that the store must hire sales associates that fit the community. Tillery also stated that Williams told her that he did not what any more black employees because it made the store look dingy, and that he expressed unhappiness with Fentroy when he walked through the store prior to an inventory.

The testimony described above is characterized by complaints of disparate treatment-that is, that Fentroy was treated less favorably than other employees because she is black. The essence of a disparate treatment claim is different treatment. Disparate treatment occurs when "[t]he employer simply treats some people less favorably than others because of their race." Teamsters v. United States, 431 U.S. 324, 335 n.15. When viewed in the light most favorable to Fentroy, Fentroy showed that she received smaller raises than white employees, that she was not permitted to return to her old position when she returned from medical leave even though white employees were permitted to return to their positions, and that white employees were promoted and that she was not. In other words, Fentroy presented evidence that Dillard's treated her differently than white employees. Although this evidence may support a jury verdict for a disparate treatment claim, the jury was not asked whether Fentroy was subjected to disparate treatment because of her race. Instead, the jury was asked whether Dillard's "subjected Ms. Fentroy to a

hostile or abusive work environment on account of her race?" The evidence discussed above does not support this question.

Notably, no evidence exists that Fentroy was subjected to racially discriminatory intimidation, ridicule or insult. No evidence indicates that Fentroy was the subject of racial harassment. Even Tillery, who was arguably the most damaging witness for Fentroy, testified that she was not aware of anyone making any remarks about Fentroy's race, and that she did not know of any facts that suggested that Williams wanted Fentroy gone because she was African American. Without evidence of racial harassment, there is no evidence to support the jury's verdict. As a result, the district court erred by denying Dillard's motion for judgment as a matter of law.

Fentroy's Appeal

Fentroy appealed the district court's judgment setting aside the jury's punitive damages award. This court, however, has determined that no evidence exists to support the jury's liability finding. Without a finding of liability, no basis exists for a damages award. As a result, the district court's amended judgment awarding compensatory damages must be reversed.

Conclusion

Having determined that no evidence exists to support the jury's liability finding, and that the district court erred by denying Dillard's motion for judgment as a matter of law, this court must reverse the district court's judgment and render judgment as a matter of law in favor of Dillard's. See Krystek v. Univ. of S. Miss., 164 F.3d 251, 259 (5th Cir. 1999). Although arguably Fentroy may have been entitled to a new trial for a disparate impact claim, Fentroy never challenged the district court's summary judgment order. As a result, she waived the opportunity to re-try her case on a disparate impact theory. Accordingly, this court shall REVERSE the district court's amended judgment, signed on May 23, 2000, and RENDER judgment for Dillard's .

Footnotes

[1] District Judge of the Western District of Texas, sitting by designation.

[2] Pursuant to 5th Cir K. 47.5, the court has determined that this opinion should not be published and is not precedent under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[3] Appeal No. 00-20552 applies to Dillard's challenge.

[4] Appeal No. 00-20990 applies to Fentroy's challenge.

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP,
Defendant.

Entered May 24, 2000

ORDER

Pending before the Court is the Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and Supporting Brief (Instrument #90) filed by Defendants, Dillards Texas Operating Limited Partnership and Barry Williams. Having considered the motion, submissions on file, and the applicable law, the Court determines that the motion should be granted in part and denied in part.

Plaintiff Kathy W. Fentroy ("Fentroy") sued her former employer, Dillards Texas Operating Limited Partnership ("Dillards"), and her former supervisor, Harry Williams (collectively "Defendants"), for constructive discharge and hostile work environment, in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et seq. ("Title VII"), disparate treatment, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112, et seq. ("ADA"), intentional infliction of emotional distress, and a violation of the Family Medical Leave Act, 29 U.S.C. § 2601, et seq. ("FMLA"). Upon motion by Defendants, the Court granted summary judgment in part, dismissing Williams from the lawsuit and allowing Fentroy to

go to trial only on her hostile work environment claim. A jury found for Fentroy and awarded compensatory damages in the amount of $24,000 .00 and punitive damages in the amount of $72,000.00. Dillards now moves for judgment as a matter of law in its favor, or alternatively, for the Court to alter or amend the judgment, or grant a new trial.

Dillards moves for relief on the following five grounds:

(1) that some of the acts upon which Fentroy bases her claims are barred by the statute of limitations;

(2) that there is insufficient evidence of discrimination to support the verdict;

(3) that certain evidence was improperly admitted at trial;

(4) that there is insufficient evidence of causation to support the verdict; and

(5) that there is Sufficient evidence to support an award of punitive damages.

The Court finds that Dillards is not entitled to relief based upon the first four grounds. However, the Court finds that judgment as a matter of law in favor of Dillards is appropriate regarding the award of punitive damages for the following reasons.

Prior to 1991, Title VII claimants were not entitled to the recovery of punitive damages. See e.g. Davis v. City of Dallas, 748 F. Supp. 1165, 1179 (N.D. Tex. 1990). The Civil Rights Act of 1991 added 42 U.S.C. § 1981a, which specifically allows for the recovery of punitive damages in Title VII cases. However, in order to recover punitive damages, a claimant must show that the defendant engaged "in a discriminatory practice or discriminatory practices with malice or with reckless

indifference to the federally protected rights of [the claimant]." 42 U.S.C. § 1981a(b)(1). Thus, in the instant case, in order to recover punitive damages, Fentroy was required to show that Dillards discriminated against her based upon her race and with malice or reckless indifference for her federally protected rights.

The Supreme Court has recently defined the terms "malice" and "reckless indifference" in the Title VII context. See Kolstad v. American Dental Ass'n, 119 S.Ct. 2125, 2124-25 (1999). "Malice" is defined as "evil motive or intent." Id. (quoting Smith v. Wade, 461 U.S. 30, 56 (1983)). "Reckless indifference" is defined as "discriminat[ing] in the face of a perceived risk that [the employer's] actions will violate federal law...." Id. After reviewing the record, the Court finds that there is no evidence to support the jury's determination that Dillards acted with suck malice or reckless disregard. Accordingly, the Court hereby

ORDERS that Defendant's Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and Supporting Brief (Instrument #90) is GRANTED IN PART AND DENTED IN PART. The jury's award of punitive damages in the amount of $72,000.00 is set aside. All relief not expressly granted herein is DENIED.

SIGNED at Houston, Texas, on this the 19 day of May, 2000.
DAVID HITTNER
United States District Judge

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP,
Defendant.

Entered May 24, 2000

AMENDED FINAL JUDGMENT

As the Court has granted in part Dillard's Renewed Motion for Judgment as a Matter of Law, Alternative Motion to Alter or Amend Judgment or Motion for New Trial, and. Supporting Brief, and set aside the jury's award of $72,000.00 in punitive damages, the Court hereby

ORDERS that judgment be entered in favor of the Plaintiff and against Defendant Dillards in the amount of $24,000.00 in compensatory damages.

THIS IS A FINAL JUDGMENT.

SIGNED at Houston, Texas on this the 23 day of May, 2000.

DAVID HITTNER
United States District Judge

CIVIL ACTION NO. H-97-3213

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KATHY W. FENTROY,
Plaintiff,

v.

DILLARDS TEXAS OPERATING LIMITED PARTNERSHIP
and HARRY WILLIAMS,
Defendants.

Entered June 18, 1999

MEMORANDUM OPINON AND ORDER

This employment discrimination case is before the Court on Defendants' Motion for Summary Judgment (Instrument No. 20).[1] Based on the Court's thorough review of the full record. and the application of governing legal authorities, the Court grants Defendants' Motion as to all claims against Defendant Harry Williams, and as to the Americans With Disabilities ("ADA") claim the intentional infliction of emotional distress claim, and the Family and Medical Leave Act ("FMLA") claim against Defendant Dillard Texas Operating Limited Partnership ("Dillard's"). The Court denies the motions to the Title VII claim against Dillard's.

I. FACTUAL BACKGROUND

Plaintiff Kathy W. Fentroy, an African-American female, began working as a sales associate at Joske's on a part-time basis in 1980. Upon her graduation from college, Plaintiff began to work at Joske's on a fill-time basis.

Dillard's purchased Joske's in 1987, by which time Plaintiff had been promoted to Area Sales Manager ("ASM"). During

her career with Dillard's, Plaintiff worked in many different departments in a number of different store locations. In September 1994, Plaintiff was assigned to help open the new Dillard's store in The Woodlands Mall. Defendant Williams was her Store Manager.

Plaintiff recites a number of numerous events during her career with Dillard's. Plaintiff complains that she was treated differently because of her race, that she received smaller raises than her white coworkers, that she was not considered for promotions which were awarded to less-qualified white employees, that she was denied the opportunity to work in certain departments because of her race, that she was given less desirable assignments, that she was disciplined more severely for inventory shortages than similarly-situated white employees, and that she was criticized frequently.

Plaintiff was absent from work on sick leave in early September 1995. She attempted to return to work on September 18, 1995, but upon her arrival she began to shake and cry. As a result Plaintiff continued to be on an extended leave of absence until December 11, 1995. After she had been on leave for more than twelve weeks, Dillard's filled Plaintiffs ASM position. When Plaintiff returned to work on December 11, 1995, Williams determined that there were no ASM positions available. Plaintiff was assigned to a sales associate position in the ladies' ready-to-wear department, a commissioned sales position.

On January 25, 1996, Plaintiff submitted her resignation. In accordance with Plaintiff's notice of resignation, her employment with Dillard's ended February 9, 1996.

Plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on May31, 1996. Plaintiff alleged discrimination on the basis of race, sex and a perceived disability. After receiving her Notice of Right to Sue, Plaintiff filed this lawsuit on September 24, 1997. Plaintiff alleged that Dillard's and Williams violated Title VII, the ADA, and the FMLA. Plaintiff also asserted a cause of

action for intentional infliction of emotional distress.

II. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Sanders v. Casa View Baptist Church, 134 F.3d 331, 334 (5th Cir.), cert. denied, 119 S. Ct. 161 (1998); Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (en bane). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. Bozé v. Branstetter, 912 F.2d 801, 804 (5th Cir. 1990).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial, lithe movant meets this initial burden, the burden shifts to the nonmovant to demonstrate with "significant probative evidence" that there is an issue of material fact so as to warrant a trial. Texas Manufactured Housing Ass'n v. Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996), cert. denied, 521 U.S. 1112 (1997); Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 161(5th Cir.). cert. denied, 519 U.S. 1029 (1996).

"Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless." Duplantis v. Shell Offshore. Inc., 948 F.2d 187, 192 (5th Cir. 1991). Rumors, speculation, hearsay and other information which would be excluded at trial cannot be considered in ruling on a motion for summary judgment. Fowler v. Smith, 68 F.3d 124, 126 (5th Cir. 1995).

"Summary judgment is a marvelous tool when used correctly. It can cut to the heart of disputed legal issues and resolve them, so long as the underlying material facts are undisputed. However, summary judgment is completely inappropriate when a law suit turns on a disputed question of material fact" Equal Employment Opportunity Comm. v. Brown & Root Inc.. 688 F.2d 338, 339 (5th Cit 1982). See also Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 765 (5th Cit 1996) (summary judgment inappropriate where genuine issue of material fact exists).

III. STATUTORY CLAIMS AGAINST HARRY WILLIAMS

It is well-established in the Fifth Circuit that employees may not be sued in their individual capacities for damages under Title VII. See Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. cert. denied, 513 U.S. 1015 (1994). Similarly, an individual employee in his official capacity is not a proper Title VII co-defendant with the corporate employer, Indest v. Freeman Decorating, Inc., 164 F.3d 258, 262 (5th Cir. 1999).

Similar rules apply to claims against individual employees under the ADA. See Kacher v. Houston Community College System, 974 F. Supp. 615, 619 (S.D. Tex. 1997). Plaintiff agrees that Williams is not a proper defendant under the ADA and Title VII.

Plaintiff argues, however, that Williams is a proper defendant under the FMLA. The only authority Plaintiff cites in support of her argument is a decision from the Central District of California. The Court finds Plaintiff's argument unpersuasive. Title VII, the ADA, and the FMLA are frequently asserted together and construed similarly. Consequently, the authority regarding individual liability under Title VII and the ADA applies equally to FMLA claims. Seaman v C.S.P.H., Inc., 1997 WL 361652 *2 (N.D. Tex. 1997).

Williams is entitled to summary judgment on Plaintiff's Title VII, ADA, and FMLA claims.

IV. CLAIMS AGAINST DILLARD'S

A. Title VII Claim

Plaintiff alleges that she was subjected to a racially hostile work environment, that she was denied raises and promotions on the basis of her race, and that she was demoted because she is African-American Dillard's argues that Plaintiff cannot present evidence of events which occurred more than 300 days before she fled her EEOC charge, that Plaintiff was not constructively discharged, and that Plaintiff fails to raise a genuine issue of material fact to support her Title VII claim.

Events Occurring More Than 300 Days Before EEOC Charge. Dillard's argues that Plaintiff cannot present evidence of alleged racial harassment occurring more then 300 days before she filed her EEOC charge. Plaintiff alleges instances of sexual harassment which occurred within the 300-day period immediately before she filed her EEOC charge. Plaintiff also alleges and presents evidence that the racial harassment was ongoing, was similar in nature, and was a persistent condition in her workplace, As a result, Plaintiff's hostile environment claim is subject to the continuing violation doctrine. See Huckabay v. Moore, 142 F.3d 233, 239 (5th Cir, 1998). The Court will receive evidence of racially harassing incidents that occurred more than 300 days before Plaintiff filed her EEOC claim,

Constructive Discharge Claim- In order to prove constructive discharge, Plaintiff's working conditions must be so difficult or unpleasant that a reasonable person in her shoes would have felt compelled to resign. See Webb v. Cardiothoracic Surgery Associates, 139 F.3d 532, 539 (5th Cir. 1998); Ward v. Bechtel Corp., 102 F.3d 199, 202(5th Cir. 1997); Landgraf v. USI Film Prods., 968 F.2d 427,429-31(5th Cir. 1992), aff'd 511 U.S. 244 (1994). Although the conditions described by Plaintiff may well support her claim of a racially hostile and discriminatory environment, Plaintiff must demonstrate "'a greater severity or pervasiveness of harassment than the

minimum required to prove a hostile work environment." Weller v. Citation Oil & Gas Co., S4 F.3d 191, 195 a7 (5th Cir. 1996), cert. denied, 519 U.S. 1055 (1997); accord Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998). Plaintiff's "resignation must have been reasonable under all the circumstances." Barrow v. New Orleans 3.8. Ass'n. 10 F.3d 292,297 (5th Cir. 1994). The conditions described by Plaintiff are not such that a reasonable person would have fell compelled to resign. The Court grants the Motion for Summary Judgment on Plaintiff's constructive discharge claim.

Racially Hostile and Discriminatory Work Environment — Plaintiff alleges and presents evidence that she was persistently subjected to a work environment in which she was harassed and discriminated against because of her race. Plaintiff presents evidence that less-qualified white employees were given promotions, larger raises, and more desirable assignments which Plaintiff had requested. Plaintiff presents evidence that she was required to provide documentation for absences while white co-workers were not required to provide documentation for similar absences. Plaintiff presents evidence that similarly-situated white employees who were on leave were returned to their regular ASM position after their leave terminated, while Plaintiff was assigned to an inferior position. Plaintiff presents evidence that she was criticized more harshly than similarly-situated white employees.

Plaintiff's evidence raises a genuine issue of material fact regarding her Title VII claim Dillard's is not entitled to summary judgment on this claim.

B. ADA Claim

In 1990, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a

disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees,.. . and other terms, conditions, and privileges of employment." Id. § 12112(a). The ADA defines "disability," as either: (A) a mental or physical impairment that substantially limits one or more major life activities in such individual; (B) a record of such impairment or (C) being regarded as having such impairment. 42 U.S.C. § 12102(2XA), (B), and (C).

Plaintiff alleges that Dillard's regarded her as having a disability. Plaintiff argues that there exists a genuine issue of material fact on this claim because (1) she was on medical leave; (2) she was told that she had been "out sick" a long time; and (3) Dillard's "offered her the option of 2 lower volume store' while she [was] in apparent distress." Plaintiff's Response, at 25.

"For an employer to regard an impairment as substantially limiting work, the employer must regard an individual as significantly restricted in his ability to perform a class or broad range of jobs." Hamilton v. Southwestern Bell Telephone Co., 236 F.3d 1047, 1051-52 (5th Cir. 1998); Price v. Marathon Cheese Corp., 119 F.3d 330,336(5th Cit 1997). The Fifth Circuit has held clearly and repeatedly that "an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job.'

Pryor r. Trane Co., 138 F.3d 1024, 1028 (5th Cir. 1998) (quoting Ellison v. Software Spectrum, Inc. 85 F3d 187, 192 (5th Cir. 1996)); Price, 119 F.3d at 336; Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 806 (5th Cir. 1997), cert. denied, 118 & Ct. 1050 (1998).

It is undisputed in this case that Dillard's offered Plaintiff alternate positions with the company and continued to employ Plaintiff after being notified of Plaintiff's depression. Plaintiff has failed to raise a genuine issue of material fact regarding her claim that Dillard's perceived or treated her as

having a disability as defined by the ADA. Dillard's is entitled to summary judgment on Plaintiff's ADA claim.

C. Intentional Inflict ion of Emotional Distress Claim

In order to prevail on a claim of intentional infliction of emotional distress, Plaintiff must establish that Defendants acted intentionally or recklessly, that their conduct was extreme and outrageous, and that their actions caused severe emotional distress to Plaintiff. Burden v. General Dynamics Corp., 60 F3d 213,218(5th Cir. 1995); MacArthur v. University of Texas Health Center. 45 F.3d 890, 898 (5th Cit 1995); Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993). The Court concludes that Plaintiff has failed to satisfy the second requirement.

Whether conduct is extreme and outrageous is initially a question of law for the Court. Danawala v. Houston Lighting & Power Co., 14 F.3d 251, 256 (5th Cir. 1993); Wornick, 856 S.W.2d at 734. Conduct is sufficientiy outrageous only if it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." MacArthur, 45 F.3d at 898. "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." Ugalde v. W.A.

McKenzie Asphalt Co., 990 F2d 239,243(5th Cir. 1993) (supervisor's repeated reference to Ugalde as a "wetback" did not constitute extreme and outrageous conduct) A claim for intentional infliction of emotional distress will not lie for "mere employment disputes," MacArthur, 45 F,3d at 898. See also Diamond Shamrock Refining and Marketing Co. v. Mendez, 844 S.W2d 198, 202 (Tex. 1992) (allegations that employer terminated Plaintiffs employment and "falsely depict[ed] him in the community as a thief' did not constitute conduct which is outrageous).

In this case, Plaintiff alleges that she was denied promotions and raises that she was required to provide documentary

proof when she requested medical or funeral leave, that she was given inferior assignments, and that she was demoted. These allegations, taken as true, do not as a matter of law rise to the level of extreme and outrageous conduct required to support a claim of intentional infliction of emotional distress. The alleged behavior is significantly less egregious than conduct found not to constitute intentional infliction of emotional distress in other employment cases.

Humphreys v. Medical Towers. Ltd., 893 F. Supp. 672, 681 (SD. Tex. 1995), 100 F.3d 952 (5th Cit. 1996), and cases cited therein. "Only in the most unusual of employment cases does the conduct move out of the 'realm of an ordinary employment dispute' and into the classification of extreme and outrageous as required for the tort of intentional infliction of emotional distress.' Porterfield v. Galen Hospital Corp., 948 S.W.2d 916, 920-21 (Tex. App.-San Antonio 1997, writ denied) (quoting Humphreys, 893 F. Supp. at 681).

Defendants Williams and Dillard's are entitled to summary judgment on Plaintiff's intentional infliction of emotional distress claim.

D. FMLA Claim

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 at seq. (1994) ("FMLA") provides eligible employees up to 12 weeks of unpaid sick leave each year due to a serious health condition that makes them unable to perform the functions of Their position. 29 U.S.C. § 2612 (a)(1)(D); Satterfield v. Wal-Mart Stores. 135 F.3d 973, 975 (5th Cit.), cert. denied, 119 S. Ct. 72 (1998). The FMLA provides further that upon return from leave an employee shall be restored to the position of employment he held when the leave commenced or to an equivalent position. 29 U.S.C. § 2614(a); Nero v. Industrial Molding Corp., 167 F.3d 921,925 (5th Cir. 1999). Plaintiff alleges that she was demoted when she returned from FMLA leave.

Plaintiff does not dispute that she was absent more than 12 weeks. Plaintiff has presented no evidence that Dillard's filled her ASM position before the expiration of the 12-week FMLA period. Plaintiff alleges that an ASM position at the Greenspoint Mall store was available because the Greenspoint ASM was on leave, but does not present evidence that the (Greenspoint ASM position was available under the provisions of the FMLA. Indeed, the Greenspoint ASM had been on FMLA leave for less than twelve weeks and, as a result, the position was not available for Plaintiff in December 1995. Plaintiff also argues that she should have been given a different comparable position, the Assistant ASM position at The Woodlands store. There is no FMLA requirement that employees returning after more than twelve weeks be permitted to select their choice of alternative positions.

Plaintiff also alleges that she was not given proper notice that the leave would be classified as FMLA leave. The uncontroverted evidence in the record establishes that Dillard's had a written FMLA policy which provided unequivocally that "Vacation and/or paid sick leave/salary continuation, if available, will constitute a portion of any leave requested under the Family and Medical Leave Act of 1993." Plaintiff signed an acknowledgment that she received this notice on November 2, 1994. As a result, Plaintiffs evidence does not raise a genuine issue of material fad regarding her allegation that she was not given proper notice under the FMLA.

Plaintiff has failed to present evidence to support her FMLA at Dillard's is entitled to summary judgment on this claim.

V. CONCLUSION AND ORDER

Plaintiff's allegations do not, as a matter of law, rise to the level of outrageous conduct sufficient to support her intentional infliction of emotional distress claim. Williams is not a proper defendant to the Title VII, ADA or FMLA claims. Plaintiff has failed to present evidence which raises a genuine

issue of material fact regarding her ADA and FMLA claims, but the evidence raises a fact dispute regarding her Title VII claim. Accordingly, it is hereby

ORDERED that Defendant's Motion for Summary Judgment (Instrument No. 20) is DENIED as to Plaintiff's Title VII claim against Dillard's and GRANTED in all other respects.

Plaintiffs Motion for Leave to File Supplement (Instrument No. 45) is GRANTED.

SIGNED this 17 day of June, 1999, at Houston Texas.
DAVID HITTNER
UNITED STATES DISTRICT JUDGE

Footnotes

[1] Also pending is Plaintiff's request to supplement her response to Defendants' motion (Instrument No. 45). The Court grants this motion.

No. 00-20552

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KATHY W. FENTROY,
Plaintiff-Appellee – Cross-Appellant,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants.

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant – Cross-Appellee.

No. 00-20990

KATHY W. FENTROY,
Plaintiff-Appellee,

versus

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP, ET AL
Defendants,

DILLARDS TEXAS OPERATING
LIMITED PARTNERSHIP
Defendant-Appellant.

Appeals from the United States District Court for the
Southern District of Texas, Houston

Before DAVIS and JONES, Circuit Judges, and PRADO,[1]
District Judge.

Filed December 6, 2001

ON PETITION FOR REHEARING

Before DAVIS and JONES, Circuit Judges, and PRADO*, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied
ENTERED FOR THE COURT:

United States Circuit Judge

/

Footnotes

* District Judge of the Western District of Texas, sitting by designation.